Fourth District Court of Appeal
for the
State of California

FERNANDO MARTINEZ,

APPELLANT,

v.

STEPHEN O'HARA,

RESPONDENT.

FOURTH DISTRICT COURT OF APPEAL CASE NO. G054840

SAN DIEGO SUPERIOR COURT CASE NO. 30-2012-614932

ON REVIEW FROM THE SAN DIEGO SUPERIOR COURT
COMMISSIONER CARMEN LUEGE, JUDGE PRESIDING
JUDGE KIMBERLY DUNNING, JUDGE PRESIDING
JUDGE GREGORY MUNOZ, JUDGE PRESIDING

Appellant's Opening Brief

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I.

INTRODUCTION

After 20 years of street fighting in the legal system, and old enough now to speak truth to power and weather the consequences, you notice a few things about judicial rulings. One thing you learn is that there are basically two kinds: rulings premised on judicial advocacy and ones based on judicial analysis.

The advocacy rulings are the product of a judge taking sides. They are in favor of the party being sided with and the ruling comes out as observations in support of the favored party in every way plausible. For the side the ruling is adverse to, virtually everything said by that party is wrong, every argument incorrect, correct arguments are ignored or minimized, the disfavored party is bad, his lawyer is incompetent, and the cause is nefarious. It is advocacy on the judicial level. Opinions are the legal vehicle by which to achieve desired outcomes, no matter what the law is.

In contrast, the analytical rulings do not reveal allegiance to any given party. They are interpersonally agnostic. They are motivated by the legal analytics governing the issue, not identity politics. These rulings come in as a mixed bag of observations and analytical paths. There is no discernable pattern in their outcomes, which is consistent with the reality that almost all disputes have a basket of merits and demerits. You win some, you lose some, but you get an honest broker's assessment of the facts applied to the law.

Advocacy is, of course, advocacy. Judges are not supposed to behave as advocates, but it is perhaps part-understandable occupational hazard and part-understandable ideological loyalty. For example, and most commonly, judges with law enforcement backgrounds tend to rule in favor of law enforcement litigants. It is a natural and expected symptom of the human condition.

However, judicial advocacy marks a considerable transgression of the principle that the United States was founded on a government of laws rather than men. Each time an advocacy ruling is issued, an announcement is made that the law does not really

matter. These rulings declare to the public that what matters is who you are to the individual judge you are appearing before, not what the law is given the facts you have presented.

From this lawyer's perspective, this Court's most memorable opinion, *Mabry*, was a singularly astonishing piece of literature. It affirmed and explained a series of principles amidst a warlike battle between furious individual litigants attacking, and being attacked by, an equally merciless banking industry. During the Great Recession, there was a state-wide, trial-court-level defense of the banks – a lot of advocacy as a perceived response to a consumer attack on the banking system – and then amidst all the confusion and anger and upheaval, this Court issued a singularly elegant clarification of how real estate foreclosure is supposed to work.

Its analysis of tender in particular, which had been used as a ruthless legal club against plaintiffs to knock out otherwise meritorious claims, was one of the most refreshing, accurate pieces of legal writing, drafted in an impossible political environment, that this lawyer has ever had the privilege to read.

All lawyers and judges should aspire to have that kind of detracted perspective on challenging legal problems. All litigants should aspire to analyze problems amidst the often-confusing morality, politics and uncertainty of legal disputes in this manner. *Mabry* marks the gold standard for analytical judicial decision in a world where advocacy is often incentivized. It captures the broader adjustment in judicial decision-making Martinez is trying to catalyze with this appeal, even if it upsets the powers that be.

Turning to this case, Martinez was first assigned to a historically well-regarded trial judge, Hon. Judge Gregory Munoz. Unfortunately, in the months prior to his retirement, he stopped personally attending to the details of his docket. His rulings became an increasing exercise in abdication. In the process, he damaged Martinez's case. The scars from it managed to corrupt the ruling being reviewed herein, almost three years after he left the bench.

The second judge, Judge Dunning, ruled, respectfully, as an advocate. Her strategy across an entire day of motion rulings being observed seemed to focus on generating arguments to bat down plaintiffs' various requests. In Martinez's case, she issued a ruling denying 17200 certification that was little more than a series of adversarial criticisms putatively representing independent judicial analysis.

But this Court, on appeal, apparently did not think Martinez's cause was important enough to merit 17200 relief despite many errors, the certification presentation did have its weaknesses, and it found a defensible way to affirm the lower court's decision.

The case thereafter went to trial on sexual harassment and other individual torts with a third judge, Commissioner Carmen Luege, presiding. Judge Luege generally ruled during trial like a disinterested broker. The jury awarded Martinez a modest judgment for O'Hara's violation of certain sexual harassment laws.

However, her tenor changed during oral argument on Martinez's post-trial motion requesting attorney's fees. She perceived that Martinez insulted former Judge Munoz, and then as a response, translated her anger into an attack on Martinez's fee motion. She issued a mindlessly one-sided ruling – a ruling founded in advocacy rather than analysis if ever there was one – and littered with legal errors, as they always are. This is the ruling that is the subject of the present appeal.

The errors will be detailed. Like Judge Dunning's certification ruling, there is not a whole lot to debate. And like the 17200 ruling, if this Court so desires, it can find a way to affirm it for no other reason than through discretionary deference to the lower court. But should it do so; is that getting it right given all the facts and historical circumstances of this case.

Regardless of the many errors in the opinion, reversal is warranted because the ruling is not a product of good judicial decision making. It's an exercise in advocacy directed at one party founded on a desire to champion a colleague, rather than strictly

and accurately following established legal analysis governing the recovery of attorney's fees in these types of situations.

Consequently, the ruling is wrong not just because it is wrong, but because the underlying motivation for issuing this wrongful ruling was also wrong. Commissioner Luege acted as if Martinez disrespected Judge Munoz, but the truth is the opposite – Judge Munoz disrespected Martinez, and a whole bunch of other litigants, by abdicating rulings to his research clerk.

Consequently, the criticism Martinez levied about him in front of Judge Luege – upon being provoked by defense counsel with a false accusation of contempt of his rulings – was not cause for her to overreact by circling the wagons around Munoz and abandoning her duty to fairly and accurately analyze the legal issues before her.

Nonetheless, she did resort to advocacy by mercilessly attacking Martinez's case in her ruling. The style of it reveals this. Combined with the numerous factual and legal errors, in its totality it represents a quintessential case of abuse of discretion.

II.

STATEMENT OF APPEALABILITY

This appeal challenges a ruling denying attorney's fees and costs issued on November 30, 2016 (*see* 2 A 468), which captured events and rulings by Judges Gregory Munoz, Kim Dunning, and Carmen Luege. (2 A 468; Cal. Rules Ct., Rule 8.204(a)(2)(A); *see* 1 A 252; 2 A 157.)

The ruling was formalized into a final judgment signed on February 21, 2017. (2 A 473; Cal. Rules Ct., Rule 8.204(a)(2)(B).)

This appeal was timely filed on April 14, 2017. (2 A 476; Cal. Rules Ct., Rule 8.104(a)(1)(A).)

III.

SUMMARY OF FACTS

Martinez offers a summary of the facts of the case based on matters in the appellate record, as relevant to the ruling being reviewed, which comes partly from

facts admitted at trial but also from facts established during other parts of the case. (Cal. Rules Ct., Rule 8.204(a)(2)(C).)

A. Stephen O'Hara's Personal Background

Stephen John O'Hara, later changed to Stephen Stratton O'Hara, was a 61-year-old used car salesman by trade in Florida, before he moved to California in the 1980's to become a real estate agent. (1 A 12; 1 A 287; 2 A 78; *see Martinez v. O'Hara* (2017) Case No. G054840, Dkt. 9, p. 2, ¶ 3.)

He pursued what appears to be a mostly-successful career as a real estate agent, was featured in several how-to marketing books, including one notable publication called "Billion Dollar Agent." (1 A 12-13.)

The crash of the California real estate economy in 2008 was hard on professionals in that field but was treated by him as an opportunity: by selling his friends and associates on his proclaimed visionary real estate abilities through purported private opportunities in a rapidly-changing market, they lost – and he gained – about $3 million. (1 A 14, 55, 461; 3 A 11, 29-37.)

He then strung his investors along through the Great Recession, and discharged them *en masse* in a 2012 bankruptcy, his third, claiming that after a lifetime he had only amassed $22,000 in assets. (1 A 13-14; 3 A 11; 1 A 409-456.)

Essentially, O'Hara blew out his reputation to finance his retirement, leaving a trail of hardship in his wake. His friend Brenda Ranney lost $750,000 and ended up living out of her car. (1 A 55, 170, 294; 3 A 29.) The stress of non-payment partly contributed to Charles Garrison's heart attack and resulting death. (1 A 55-56; 1 A 409-456; 3 A 13; 3 A 30.) Women were usually the ones taken advantage of. (1 A 294; 3 A 29-37.)

After his 2012 discharge, and having alienated his real estate network, Mr. O'Hara turned his attention to young job seekers. (1 A 14; 2 A 225-271.) He built a website called Career Solutions and Candidate Acquisitions ("CSCA"), www.csca.com, and proposed to place young people into real estate careers. (2 A 225-271.)

He sent out an initial blast of 20,000 solicitations intended to get the attention of a national audience and solicit interest in CSCA from job seekers on both coasts. (1 A 502-503, 513, 518, 529; 2 A 16-18, 40, 51, 116, 126-130, 160, 191-192, 379, 385, 423-424; 3 A 564, 657, 659.)

However, the instant litigation ended the CSCA enterprise when O'Hara committed to the trial court to shut down the fraudulent enterprise to avoid an injunction shutting it down involuntarily. (2 A 135; 3 A 649-650.)

B. O'Hara Recruits Martinez

In July 2012, Fernando Martinez, 21 from San Diego, was working at a McDonalds, thirty-five hours per week at $8 per hour. (2 A 175.) He uploaded a resume to Monster.com. (1 A 16; 2 A 158, 175; 3 A 61-62.)

On August 10, 2012, he received an auto-generated response from O'Hara representing himself as an executive at CSCA, looking to potentially hire him in a real estate position. (2 A 158, 175; 3 A 59.) The email contained a number of false advertisements. (2 A 175-176; 1 A 514-516; 1 A 521-522; 3 A 59.)

For example, CSCA was telling Martinez (and the public) that within two years he could expect to be making $125K/year and 250K/year within three as a real estate professional, but O'Hara, who had been in the business for 30 years, reported his previous two years' of income as $72K and $85K. (2 A 175-176; 1 A 514-516; 2 A 183, 241; 3 A 12; 3 A 59; 3 A 444-445.)

O'Hara's introductory email referred Martinez to CSCA's elaborate website, in which another dozen grandiose false claims were made: it purported to be an industry leader with six separate orientation and training programs; it announced itself as an established career launching pad that only works with the "best of the best." (3 A 437-445; 2 A 231, 232, 237, 241, 243.) It claimed to have physical classrooms and an annual "class of 30" graduating students. (2 A 234, 235, 243; 3 A 442-443.) It projected an affiliation with Kendra Todd, a celebrity contestant, and the current US

president in connection with the TV show "The Apprentice." (2 A 235, 243; 2 A 394-395; 3 A 441-442.)

For employees, CSCA claimed to have Mr. O'Hara, its CEO, business partners, various team members, corporate executives, managers, an executive search team, a talent acquisition director, a talent acquisition manager, and enough career counselors and staff to potentially visit nearly every college campus in the country. (2 A 224, 227, 231, 232, 233, 243, 244, 246, 262; 3 A 437.)

As enticement for potential applicants, CSCA claimed applicants could expect to make $35-65K/yr to start as a real estate intern, $125K or more after their second year as a licensed real estate agent, and $250K or more after their third year. (2 A 224, 2 A 241; 2 A 397-398.) CSCA also claimed to have been successful enough to have "done some growing." (2 A 391; 3 A 593)

However, none of this was remotely true. (3 A 437-445.)

CSCA was little more than a marketing idea in Mr. O'Hara's head and the website itself. The growing O'Hara claims the company had undergone consisted of his decision to share his idea with two other persons. (2 A 391; 3 A 438; 3 A 593.) It had no track record of placing candidates, it had not placed anyone in the compensation categories referenced; it had no office, no classrooms, no yearly class, no affiliation with Trump's Apprentice, no national presence, no organizational team, no college recruitment history, and was composed as a structural matter of a mailbox, Mr. O'Hara's home-office, and the website. (2 A 390-398; 3 A 437-445.)

Unaware of this, the introductory email lured Martinez with its lucrative compensation claims, lack of any upfront fees, and prestigious-sounding size and affiliations. (2 A 224; 3 A 59.)

O'Hara lived as a residential matter in an upscale condo in Laguna Niguel. (1 A 12; 2 A 172.). On September 9, 2012, he invited Martinez to discuss employment opportunities. (2 A 176.) Initially the meeting was contemplated to occur at Starbucks,

but at the last minute, O'Hara changed it to his residence. (1 A 17; 2 A 176; 3 A 426.) He offered his tutelage and told Martinez he could make millions. (1 A 18-19; 2 A 177.)

However, Mr. O'Hara did not place Fernando with the loose-collection of independent real estate agents associated with the one firm CSCA had been retained by, First Team Real Estate, as that required a sales license. (2 A 175, 190; 3 A 55-57, 59, 433, 497.) Instead, he decided to keep Martinez for himself. (1 A 18; 1 A 290; 2 A 177.) O'Hara had him work physically next to him in his Laguna Hills home office on a daily basis. (1 A 57-58; 2 A 159.)

C. O'Hara Pressures, and Martinez Capitulates to, a Sexual Relationship

The sexual comments, emails, and other overtures in close proximity started promptly. (1 A 17; 3 A 72; 3 A 426-427; 2 A 159.) Stephen invited Fernando on a gay cruise. (3 A 116; 2 A 159.) He began touching him. (1 A 57; 3 A 426.) O'Hara cited a Liza Manelli song and included an overt sexual reference in his interpretation of it. (1 A 18; 1 A 57-58; 1 A 632; 3 A 112.)

O'Hara telegraphed that it would be better for Martinez's career if they became romantic partners, as well as business partners. (1 A 17-19; 1 A 58; 1 A 291; 2 A 81-82.)

O'Hara began to pressure Martinez to abandon his job at McDonald's and to devote his full energy to the real estate internship, then-paying $1,500/month. (1 A 18; 1 A 57; 2 A 159.) Martinez ultimately capitulated, which made him financially dependent on O'Hara. (1 A 18-19, 57, 291; 2 A 159.)

Through late September and early October 2012, O'Hara and Martinez spent time together, which included eight physical encounters, and included various flowery text communications. (1 A 19; 2 A 177-178; 3 A 415-424.)

D. Termination of the O'Hara-Martinez Relationship

After a few weeks, Martinez declined O'Hara's advances and disclaimed an interest in a continuing romantic partnership. (1 A 19; 2 A 159.)

On October 15, 2012, Martinez desired to come into the Laguna Hills condo to pick up his second and final paycheck, $750 owed. (1 A 20, 58; 3 A 420.)

O'Hara had expressed his feelings of true love for Martinez, who he described as a good boy, and upon their break-up, characterized the loss as "the saddest day of my life." (1 A 58; 3 A 420.) However, his projected despair did not slow him down from simultaneously contacting his accountant and deciding not to pay the outstanding $750 in wages. (1 A 58; 3 A 420, 426.)

Upset that he had recently spent about a thousand dollars entertaining Martinez, O'Hara proposed that he sign a confidential release agreement that protected O'Hara against "extreme exposure" to legal claims if their interactions were revealed to others, in exchange for a final $525 payment. (1 A 21, 32, 58, 121, 171, 293; 2 A 93, 159-160, 179, 372, 402; 3 A 124, 420, 511.)

The agreement threatened to "prosecute" Martinez if he signed an NDA and then disclosed any confidential information. (2 A 159-160; 3 A 124.)

In other words, instead of just paying Martinez's outstanding wages, O'Hara decided to leverage Martinez's financial desperation by paying Martinez only part of what O'Hara already owed Martinez on condition of Martinez releasing all claims against O'Hara. (3 A 122-124.)

However, Martinez did not sign. Instead, he weathered the loss of his housing, lost his car and ended up sleeping on his sister's couch, which tallied to $8,080 in compensatory damages. (3 A 715.)

IV.

RELEVANT PROCEDURAL EVENTS

A. Pleadings

Martinez sued O'Hara in November 2012, asserting individual causes of action for rape (dismissed), sexual harassment, fraud, Labor Code violations, and wrongful termination. (1 A 11-35; 2 A 479.)

After one substantive amendment (and other minor tweaks such that the second and third versions were not filed but merged into a Fourth Amendment), Martinez ultimately filed a Fifth Amended Complaint, the operative pleading, in August 2013. (2 A 169-272; 2 A 479, 3 A 747 [first]; 1 A 284, 2 A 489 [fourth]; 2 A 168, 2 A 495 [fifth].)

The Fifth Amended Complaint alleged causes of actions for fraud, false advertising (B&P 17500), unfair business practices (B&P 17200), Labor Code violations, sexual harassment, and sought alter ego findings. (2 A 169-272.)

B. Discovery Dispute Goes Haywire

In January 2013, Defendants noticed Martinez's deposition and included (19) document requests in the notice. (1 A 81; 1 A 93-98.) Plaintiff objected to the problematic requests on numerous grounds. (1 A 81; 1 A 100-110.)

Your undersigned and then-defense-counsel Brook Barnes spoke telephonically on February 14, 2013 in an extended meet-and-confer conference to resolve the requests. (1 A 81; 1 A 90; 1 A 175.) A number were improper because they requested all documents supporting a particular cause of action. (*See* 1 A 102-109.) Among other problems, this approach is not permitted by the code's statutory specificity requirements. (Code Civ. Proc., § 2025.220(a)(4).)

However, because a timely correction to the defective requests did not come in time before the deposition was set to go forward, and Martinez could not ratify the propriety of the anticipated amended requests, Martinez filed a motion for protective order on February 19, 2013, set for April 4, 2013, and which automatically stayed the deposition. (1 A 72-89; 1 A 76.)

The defense argued that Martinez did not meet-and-confer, but that position was plainly contradicted by the record, which reflected a detailed, telephonic, meet-and-confer conversation. (1 A 90, 121-133, 46.)

Despite a lot of generalized vitriol by Attorney Barnes complaining that Martinez was throwing wrenches into O'Hara's spokes, there was no real challenge to the

dispositive issue – that the document requests were in fact improper and had not been timely corrected. (1 A 146-151; *see* 1 A 153-161.)

On April 3, 2013, the day before the hearing, Attorney Barnes corrected his deposition notice by eliminating all of the document requests, in a second deposition notice. (1 A 199, 204, 382-383.)

By definition, the substantive objective of the motion – to eliminate O'Hara's improper document requests – had resulted in relief in Martinez's favor by subsequent action. (1 A 199, 382.) There was no point in going forward with a motion moot on the merits except as to the issue of if and how much in sanctions Martinez would be entitled to collect; as to driving to Orange County solely in pursuit of sanctions, counsel preferred to simply take a moot motion off-calendar. (1 A 194, 197, 234-235, 253, 382-383.)

However, this decision was interpreted by Judge Munoz's clerk and by Attorney Barnes as nefarious. Munoz's clerk advised Attorney Barnes to file a motion for sanctions, in violation of about ten different laws. (1 A 62-64, 207, 384, 394.) Attorney Barnes filed the lower court's requested motion the next day, on April 5, 2013, with a hearing ultimately occurring on May 16, 2013. (1 A 209-230; 2 A 284.)

Martinez explained the reasons for his actions in opposition papers, repeating his points about it being moot (1 A 232-235), which were met with O'Hara's arguments insisting that counsel should have done more to alert O'Hara's lawyers that the deposition would not go forward without correcting or eliminating the errant document requests first. (1 A 249-250.)

C. Judge Munoz Struggles Through a Sanction Hearing.

Judge Munoz issued a tentative ruling awarding $1,800 in sanctions against Martinez. (1 A 272.) The ruling provided no legal analysis or basis supporting its result. (1 A 272, 383.)

The hearing, on May 16, 2013, revealed information why Judge Munoz was potentially unfit to continue sitting on the bench. The exchange first revealed that he no

longer had a grasp of the content of his own tentative rulings. He impossibly thought that a tentative that contained no actual content should be "self-explanatory" as to its reasoning. (1 A 252; 1 A 269:11-20.)

He couldn't seem to follow a conversation. The inquiry being pressed by counsel was to ascertain the legal basis for the ruling. (1 A 269:12-19.) Instead of providing the legal basis, Judge Munoz proceeded to tell counsel that, basically, counsel was fortunate because his research clerk suggested awarding twice as much in sanctions ($3,600) but he, the judge, thought that was too much and settled on $1,800. (1 A 269:20-23.)

This position was non-responsive. It was not a legal basis but a non-sequitur, a sort-of-related-to-the-issue observation about a private negotiation in chambers between the judge and his clerk about the negotiated process by which the outcome had been arrived at as an administrative matter, not the underlying, expected, published legal analysis to support it. There was no legal explanation at all in this reported private exchange, much less one that was self-explanatory.

It was also impossible that a private conversation between Judge Munoz and his law clerk could result in an understanding, much less a self-evident one, by a litigant who was not a party to, or present for, that conversation. (1 A 269:20-23.)

The revelation of this conversation provided further cause to question Judge Munoz's fitness. Upon being informed of this internal negotiation, counsel responded by asking the judge whether he was referring to an unpublished internal memorandum. Judge Munoz responded "no," and then, confirmed that indeed he was referring to an internal "legal research report." (1 A 269:24 – 1 A 270:2.)

Confronted with the reality that an internal report self-evidently would not reveal to the litigants what the public legal basis of the ruling was, Judge Munoz changed the subject to defend the ruling by referring to the defense brief.

Thus, instead of simply acknowledging that he possibly needed to study this particular ruling further because he did not personally know the legal basis for it (was

there even one?), and thereby continuing the hearing to a future date, Judge Munoz tried to BS his way out of the problem:

Judge Munoz:	Did you look at the request by defense with regard to their costs of attorney's fees?
Pavone:	I read the moving papers and the reply papers. I wrote the opposition papers. I didn't agree with any of their arguments. I don't know why any of them are [correct].
The Court:	Okay. Well, I do. I agree with it, but I don't think that they are entitled to receive what they requested.
Mr. Pavone:	I understand that you agree with the defense. My request is for a thorough ruling so that I can understand the legal basis.
The Court:	You are not going to get any more material than what I produced in the tentative.

There is no indication that Judge Munoz actually read any of the briefs. His own questions improperly presupposed that the relevant issue was to debate the amount the defense was entitled to. (1 A 270:8-9.) It appeared based on the totality of his comments that he skimmed an internal memorandum and briefly negotiated with his clerk by settling on a lower figure than requested. Thus, when he claimed to have read the defense brief, this did not appear to be true since he had no idea what the actual arguments in the defense brief were upon being repeatedly pressed for ***any*** legal basis to support his ruling. (1 A 269-270.)

Worse, Judge Munoz then deteriorated into a sort-of invocation of his Fifth Amendment rights: "You are not going to get any more material than what I produced in the tentative." (1 A 270:20-21.)

He had not given any material in the tentative. (1 A 252.)

Judge Munoz had just been told that there was no material in the tentative. (1 A 269:16-17.)

It was also unusual for a judge to effectively terminate discussion of an issue that had literally consumed about 30 seconds of his time and two pages of transcript. It was apparent to counsel at the time that Judge Munoz was struggling through the hearing –

that he had no idea what the legal basis for the ruling was and was dodging and deflecting the inquiry – while simultaneously taking the impossible position that the legal grounds for sanctions were self-explanatory, in the face of the undeniable fact that the legal basis was clearly not only not self-explanatory, it was non-existent. (1 A 252, 269-270.)

Judge Munoz had apparently stopped personally attending to the details of his motion rulings; in Martinez's case, his clerk had sanctioned the wrong party. Judge Munoz then simultaneously revealed a series of troubling dynamics about the way he was conducting business, by crossing lines into abdication, while simultaneously trying to pin the dysfunction on the litigant. (1 A 269-270; 1 A 49-69.)

Martinez was not the first person raising concerns about judicial abdication. (1 A 387.) If it was happening frequently enough, and for a long enough time, such that this sentiment appeared in a hard copy publication, it means that rulings like the one at issue had probably been going out of Judge Munoz's chambers for months and possibly years. (1 A 387.)

Martinez moved to disqualify for cause, which bubbled up to this Court in a Writ it denied in July, 2013. (1 A 49-69; *Martinez v. O'Hara*, Case No. G048651.) It is not known exactly why Judge Munoz retired just six months later. (2 A 30.) It seems difficult to imagine that no one besides Martinez noticed these problems.

As relevant here, in reviewing the totality of these circumstances, counsel had cause to feel aggrieved in light of the fact Judge Munoz had disrespected him, and perhaps many litigants, by abdicating his job to staff and by trying to blame his failure to understand his own rulings on the litigant. It was an $1,800 sanction fine Martinez both had to pay and report to the State Bar.

Nonetheless, this would not have been a big deal in the grand scheme of things, an $1,800 speeding ticket so to speak, if Judge Munoz's handling of the case did not come up again, at the hearing on the attorney's fees motion which is currently under review.

As discussed *infra*, the mention of this open wound set off a series of exchanges between counsel and Judge Luege that appears to have motivated the instant advocacy-based ruling presently under review, at the expense of disciplined legal analysis.[1]

D. Class Certification Effort Fails.

About a year after the flap with Judge Munoz, Martinez moved in November, 2014 to certify a 17200 class to stop O'Hara's false advertising campaign, which started with the original blast of 20,000 emails and contemplated hundreds of thousands more solicitations. (1 A 491-637; 2 A 195, 370.) However, the sitting judge, Hon, Kim Dunning, denied it on a perceived failure to define a sufficiently ascertainable class and on typicality grounds. (2 A 161.)

This Court, in an opinion authored by Acting Justice Rylaarsdam, affirmed Judge Dunning's denial of certification on June 25, 2015. (2 A 157-167.)

E. Jury Trial and Verdict

The remaining claims – based on Labor Code violation, sexual harassment, fraud and for individual injunctive relief – were thereafter slated for trial. However, shortly before trial, the defense resolved the Labor Code violation by payment which mooted its need to be addressed before the jury. (2 A 473.)

1. Labor Code Violations Get Paid Days Before Trial.

In the original 2012 suit, Martinez claimed $2,250 in Labor Code violations, $750 in outstanding wages and $1,500 in penalties, for failure to timely pay an

[1] By criticism of the judges who handled this case, counsel does not want to give this Court the impression that he is unsympathetic to the challenges of being a trial judge. Every Friday morning in San Diego, the 330 bench goes through its calendar with each judge seamlessly getting his or her head into 10-75 legal situations and working to some sort of outcome. It is a feat of intellectual focus that is awe-inspiring to observe, bolstered by some judges who, with an almost miraculous feat of work product the day before, also upload 20 pages of written tentative rulings. How they find the energy to do this in light of how they spend the rest of their time – being in an almost continuous state of trial – is hard to fathom, from one who occasionally tries cases and then collapses from exhaustion afterwards. Counsel deeply respects and admires the acumen and industry of trial judges as a general matter.

employee's outstanding wages. (1 A 32.) About a month after the lawsuit was filed, O'Hara paid $975 leaving a balance of about $1,300. (1 A 180, 320; 2 A 473.)

A couple of days before the 2016 jury panel was set to be seated, and after 3-1/2 years of litigation, the defense paid another $1,300 in order to moot that issue before the panel. (2 A 293, 473.) Thus, by definition, Martinez obtained a full recovery on the labor cause of action.

2. Jury Trial on Fraud Claim

The fraud and sexual harassment claims went to trial before the jury, with the individual injunctive cause of action reserved for consideration by the bench. (3 A 718, 3 A 744.)

After Martinez testified, Judge Luege eliminated the fraud claim on request via defense motion on the basis that Martinez knew O'Hara's website was different than advertised as of their initial meeting on September 9, 2012, but he, Martinez, still proceeded to accept employment with O'Hara, thus breaking causative reliance on O'Hara's various misrepresentations. (2 A 468; *See* CACI 1900, Nos. 5, 7; 3 A 59; 3 A 127; *see* 2 A 226-266; 3 A 479)

3. Jury Verdict on Sexual Harassment Claim

Martinez obtained a jury's decision on the remaining sexual harassment claim. It found that O'Hara made unwanted sexual advances and conditioned Martinez's employment on them, awarding $8,080 in compensatory damages and declining punitive damages. (3 A 714-716.)

F. Bench Ruling on Injunctive Claim

After receiving written submissions (3 A 425-712), the Court ruled that Martinez did not lose money or property so as to have 17200 standing, and alternately found that there was no reasonable probability that the false advertising on the website would recur, since O'Hara took it down. (1 A 745.) Although Martinez could prove this ruling was wrong, the exact legal outcome is basically irrelevant in light of O'Hara's capitulation to end the CSCA enterprise. (3 A 650.)

V.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ATTORNEY'S FEES BY MAKING ERRORS IN NUMEROUS PARTICULARS AS A PRODUCT OF JUDICIAL ADVOCACY RATHER THAN ANALYSIS.

A. Inventory of Outcomes

Martinez brought five causes of action and a (sixth) request for alter ego findings in the operative Fifth Amended Complaint with corresponding outcomes as follows:

(1) **Fraud**: dismissed for causation problems during trial by Judge Luege. (2 A 468; 2 A 169, 182; *see* CACI 1900, Nos. 5, 7.)

(2) **False Advertising**: the CSCA website was found by Judge Luege to be fraudulent with O'Hara representing after trial that he took the site down and that further solicitations would not occur. (3 A 649-650, 744-745.) Class certification had been previously denied by Judge Dunning and affirmed on appeal. (2 A 169, 190; 2 A 157-167.) Judge Luege denied an individual injunction on the basis that future violations were found unlikely to recur, relying on O'Hara's post-trial commitment. (3 A 650.)

(3) **Unfair Business Practices** – same as (2). (2 A 169, 190; 2 A 157-167; 3 A 649-650; 3 A 744-745.)

(4) **Labor Code**: $2,250 as requested in the complaint was paid in full just before the jury was seated. (1 A 180, 320; 2 A 169, 212, 214, 473.)

(5) **Sexual Harassment**: jury verdict for $8,080. (2 A 169, 216; 3 A 714-716.)

(6) **Alter Ego**. The complaint requested alter ego findings as O'Hara's conduct and various representations were executed in conjunction with five different entities. (1 A 169, 172-174, 218.) O'Hara stipulated before trial that they were co-extensively liable with him. (2 A 473.)

B. Summary of Trial Court's Ruling on Fee Motion

Judge Luege ruled on Martinez's post-trial motion for fees and costs. (2 A 469-470; 2 A 277, 291, 318, 325.)

On the Labor Code claim, she found that O'Hara paid the outstanding wages early on and that the outstanding Labor Code penalty paid by O'Hara just prior to trial did not constitute wages; accordingly, Martinez was not a prevailing party on that cause of action. (2 A 469.)

On the sexual harassment claim, the trial judge denied all compensation by finding that Martinez's effort requesting $144,000 in attorney's fees was comparable in its excess to *Chavez v. Los Angeles* (2010) 47 Cal.4th 970. (2 A 469.)

She further argued that "plaintiff's counsel in this case should have determined long before trial that realistically the case was worth no more than $25,000 and should have pursued the case as a civil limited matter." (2 A 470.)

On the false advertising and unfair business practices claims, she found that no public interest was served, by characterizing the overall effort as "spectacularly unsuccessful." (2 A 469-470.)

The trial court further paid less than half the costs Martinez incurred, finding that he double billed certain items such as appellate filing fees. (2 A 470; 1 A 49, 2 A 157.)

C. Standard of Review

Generally speaking, the standard of review for issues relating to a trial court's assessment of attorney's fees and costs is whether the lower court abused its discretion. (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512; *Pellegrino v. Robert* (2010) 182 Cal.App.4th 278, 287-288).

Appellate courts rarely superimpose their interpretation on issues the trial judge was uniquely in a position to assess, such as witness credibility, or in settling conflicting factual information. (*People v. Black Hawk Tobacco* (2011) 197 Cal.App.4th 1561, 1568.)

However, if factual information is misunderstood or legal principles are misapplied, a trial judge's discretionary ruling is subject to reversal. (*San Jose v. Medimarts* (2016) 1 Cal.App.5th 842, 850; *Huong Que v. Luu* (2007) 150 Cal.App.4th 400, 408; *Strategix v. Infocrossing West* (2006) 142 Cal.App.4th 1068, 1072; *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463.)

Additionally, an appellate court will review the trial court's ruling on a motion for attorney fees *de novo* to the extent that it turns on an issue of statutory

construction. (*Kirby v. Immoos* (2012) 53 Cal.4th 1244, 1250; *Imperial Merchant Services v. Hunt* (2009) 47 Cal.4th 381, 387-388.)

Judicial motivation may be considered, if done professionally, in deciding whether an amount of error surpasses the threshold such that the lower court's discretion was abused. (*Fine v. Fine* (1946) 76 Cal.App.2d 490, 495-496 [finding that inquiry into judge's motives was not necessary when ruling was "so unreasonable"]; *Lazzarotto v. Atchison Railway* (1958) 157 Cal.App.2d 455, 462-463 [criticizing appellant for impugning the trial court's motives in a rancorous, improper fashion]; *Dabney v. Dabney* (1942) 54 Cal.App.2d 695, 702.)

D. The Trial Court Concluded that Labor Code Penalties Are Not Wages. It Abused Its Discretion Because It Misunderstood the Law.

Of a $2,250 labor claim composed of $750 in outstanding wages and $1,500 in penalties, at first O'Hara tried to get Martinez to admit he was an independent contractor, then he denied that Martinez was owed any compensation, then he paid the outstanding wages shortly after Martinez filed suit. (1 A 181.)

However, Mr. O'Hara did not pay the penalties. He reserved his independent contractor argument for the next four years of litigation, up to the start of trial, when he issued a second check to cover the outstanding balance. (2 A 473.)

Labor Code section 218.5 provides "[i]n any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party..." (Lab. Code, § 218.5; *see Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.)

The trial court denied fees on the basis that they were not recoverable as to the payment of penalties, by citing *Ling v. P.F. Chang's* (2016) 245 Cal.App.4th 1242, 1261.

In *Ling*, an arbitrator awarded an employee about $1,000 for missed meal periods and about $7,600 in associated wait time penalties. After bouncing back and

forth between the arbitrator and the courts, the Sixth District held that Ling could not recover her attorney's fees based on these awards. (*Id*., at 1261.)

Ling held that the employee's claim for missed meal breaks did not constitute wages. "Because a section 203 claim is purely derivative of an action for the wages from which the penalties arise, it cannot be the basis of a fee award when the underlying claim is not an action for wages." (*Id*., at 1261.)

Here, in contrast, the underlying claim was tethered to an action for wages. The $1,500 penalty derived from O'Hara's failure to timely pay Martinez's last check. The language of section 203 answers O'Hara's contention: if an employer fails to pay wages, "the wages of the employee shall continue as a penalty." (Lab. Code, § 203.) Thus, the Code considers the penalty to be continuing wages. *Ling* does not suggest otherwise.

Yet, the trial court did not address or explain why she thought *Ling* was valid authority for the opposite proposition, which marks this particular decision as the first of many red flags suggesting the ruling was a product of advocacy rather than analysis.

Because a ruling can be upheld on any basis supported by the record (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627), Martinez also reviews a different argument, one raised by Mr. O'Hara.

O'Hara argued below that Martinez was not the prevailing party because the Court memorialized but did not award the outstanding wages as part of the judgment. (2 A 473.) However, this argument does not change the prevailing party analysis. If a party to litigation reaches his sought-after destination, then he prevails regardless of the particular route taken. (*Graham v. DaimlerChrysler* (2004) 34 Cal.4th 553, 570-571; *Buckhannon v. West Virginia* (2001) 532 U.S. 598, 633-634.)

This is determined based on which party succeeded on a practical level. (*Graciano v. Robinson*, 144 Cal.App.4th 140, 150 citing *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1018). After four years of litigation, Martinez was

finally paid the full $2,250 on his labor claim and thus achieved the objectives stated in the complaint. (1 A 180, 320; 2 A 293, 473.)

Nor does the small recovery change the analysis. In *Graciano*, Division One analyzed "prevailing party" language from a comparable consumer statute (comparable to Labor Code § 218.5) stating that: "The provision for recovery of attorney's fees allows consumers to pursue remedies in cases as here, where the compensatory damages are relatively modest. To limit the fee award to an amount less than that reasonably incurred in prosecuting such a case, would impede the legislative purpose underlying section 1780." (*Graciano*, 144 Cal.App.4th 140, 150, citing *Hayward v. Ventura Volvo* (2003) 108 Cal.App.4th 509, 512.)

The California Legislature enacted the Labor Code's fee shifting provisions to allow employees to hold employers liable for nonpayment of wages, often in small amounts. (*Kirby v. Immoos* (2012) 53 Cal.4th 1244, 1257.)

For these reasons, the time spent on this cause of action was compensable because penalties are treated as wages, notwithstanding O'Hara's tactic of purchasing his way out of a formal judgment days before the jury panel was seated, and regardless of the small amount at stake. (2 A 293, 473.)

E. The Trial Court Abused Its Discretion by Denying Fees on the Sexual Harassment Cause of Action by Misapplying the Principles of *Chavez.*

The Fair Employment Housing Act ("FEHA") permits attorney's fees to be awarded to a successful plaintiff. (Gov. Code, § 12965, subd. (b).) The purpose of such awards is to make it easier for plaintiffs of limited means to pursue meritorious cases. (*Cummings v. Benco* (1992) 11 Cal.App.4th 1383, 1387). Such incentives are intended to encourage litigation of valid sexual harassment claims. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 584.)

Trial courts should ordinarily award attorney fees to a prevailing plaintiff unless special circumstances would render an award unjust. (*Chavez v. Los Angeles* (2010) 47 Cal.4th 970, 987; *Young v. Exxon* (2008) 168 Cal.App.4th 1467, 1474;

Steele v. Jensen Instrument (1997) 59 Cal.App.4th 326, 331). The trial court must give due consideration to the policies and objectives of the FEHA in general and of its attorney fee provision in particular. (*Chavez,* at 987.)

This case, and Martinez's circumstances, fall into the mischief FEHA was intended to rectify: he was terminated because he refused to have a continuing sexual relationship with his employer, O'Hara. (3 A 714-716.)

The trial court gave three basic reasons for denying fees:

(1) it argued that Martinez over-litigated the case in a similar fashion to *Chavez v. Los Angeles* (2 A 469);

(2) it argued that the case did not result in any public benefit (2 A 470);

(3) it cited plaintiff counsel for an allegedly excessive damage request and thus faulted him for not bringing the action as a limited civil matter (2 A 470.)

These reasons do not hold up under scrutiny.

Furthermore, and (trying to delicately) consider judicial motivation, it appears Commissioner Luege was offended that Martinez criticized Judge Munoz's competency, and issued a ruling founded in advocacy as a result. (2 A 457-459.) This is detectable because a number of findings and rulings are plainly indefensible: they inexplicably ignore dispositive facts, circumstances and authority tendered to the lower court prior to its issuance of the ruling, limitations that should have changed the analysis had they been seriously dealt with.

1. The Trial Court Did Not Apply the Correct Legal Analysis Pursuant to the Requirements of *Chavez*.

The trial court analyzed the fee issue under the assumption that it had unfettered discretion to award (or not award) attorney's fees, by citing the statute. (2 A 469.) While the statute uses the term discretion, the legal analysis has been clarified to create an expectation that fees will ordinarily be awarded unless the trial judge finds a special circumstance to deny them. (*Chavez*, 47 Cal.4th 970, 987; *Lopez v. Routt* (2017) __ Cal.App.5th __, 2017 WL 5787294, *4.)

The lower court did not start from a place in which an award of fees was expected. It treated the matter as if it were merely an option. (*See Chavez*. 987; 2 A 469.) Furthermore, it never gave any recognition to the policies and objectives of FEHA or its attorney fee provision as also required by *Chavez*. (*Ibid*.; *see Toshiba v. Superior Court (Lexar)* (2004) 124 Cal.App.4th 762, 772; 2 A 284, 369, 469-470; *Zador v. Kwan* (1995) 31 Cal.App.4th 1285, 1303.)

2. The Trial Court's Comparison of this Case to *Chavez* Was Categorically Unreasonable Given the Disparate Fee Requests.

The most prominent feature of the trial court's ruling was to compare this case to *Chavez*. (2 A 469.) The plaintiff in *Chavez* requested ***$870,000***; Martinez requested $144,000. (2 A 290, 469.) Martinez's request was 16.6% of Chavez's request. The two cases are categorically incomparable. (2 A 456-457.) Comparing a fee request that is 6 times as large on a relative basis and $710,000 more on an absolute one is facially "so unreasonable" that the trial court's comparison to *Chavez* is itself an abuse of discretion. (*See Fine v. Fine* (1946) 76 Cal.App.2d 490, 495-496; 2 A 456-457.)

3. The Trial Court's Attack on the Success of the Litigation Is Contradicted by the Record of Actual Outcomes.

The trial court went on to observe that the factual similarities between this case and *Chavez* were "striking." (2 A 469.) It never exactly identified what was so strikingly similar, but it did cite the modest damage award, argued that there was only one successful claim, was over-litigated, and did not result in significant benefit to anyone besides Martinez. (2 A 469.)

Granted, the modest damage award was similar to *Chavez*. However, that's it. Martinez prevailed on the Labor Code claim (1 A 180, 320, 2 A 473), he got the relief he requested with the B&P 17200/17500 actions as a practical matter (since O'Hara shut down CSCA and its website, 3 A 649-650, 744-745) and he won on the sexual harassment claim (3 A 714-716).

O'Hara tried to dilute Martinez by operating through alter ego corporate entities, but O'Hara capitulated at trial to have all of them be co-extensively liable as himself. (2 A 473.) The only claim that was a clear loss was the fraud claim, which Commissioner Luege herself removed from the jury's consideration. (2 A 468.) It is not clear whether a jury would have reached the same conclusion, had the matter been put to it.[2]

Chavez filed twelve causes of action and prevailed on one. (*Chavez*, 978-979, 990.) Martinez brought six claims, and obtained relief on five. (2 A 169; 2 A 473-474; 3 A 650, 714-716.) There is no comparison to *Chavez* on these criteria.

These dynamics also speak to the trial court's criticism that the action was "spectacularly unsuccessful." (2 A 470.) Really? Martinez obtained a verdict from a jury that O'Hara committed sexual harassment by leveraging employment in exchange for sexual submission, a considerable wrong according to contemporary standards, in litigation which is almost automatically treated as in the public interest. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 584; 3 A 714-716.)

In addition, after four years of dodging, delaying and defending, Martinez obtained a full recovery on the Labor Code violations. (1 A 180, 320; 2 A 401-403, 473.)

O'Hara's website contained more fraud than Madoff's books and Martinez unraveled all of it; some 36 claims were impeached. (3 A 744; 2 A 196-209; 2 A 226-266; 1 A 514-568; 3 A 497; 3 A 126, 175, 189, 247, 249.) This ultimately resulted in a legal finding that the website was indeed fraudulent with O'Hara thereafter

[2] Even if the fraud claim was arguably defective on the reliance element, to criticize Martinez for including it among a sea of O'Hara's misrepresentations falls into the Supreme Court's admonition against engaging in hindsight bias. (*Chavez v. Los Angeles* (2010) 47 Cal.4th 970, 986-987; 2 A 468; 2 A 450; 3 A 58; 2 A 226-266.)

abandoning his precious recruitment and sexual-pipeline tool. (3 A 649-650; 3 A 499, 514, 523, 525, 538-540, 542, 550, 551, 560.)[3]

At the same time, the litigation ended O'Hara's anticipated national marketing campaign for CSCA and necessarily prevented many thousands of future false advertisements that would potentially wreak havoc on the lives of naïve young job seekers. (3 A 649-650; 2 A 249 [¶ 8]; 1 A 502-503, 513, 518, 529; 2 A 16-18, 40, 51, 116, 126-130, 160, 191-192, 379, 385, 423-424; 3 A 564, 657, 659.)[4]

For the trial court to characterize this litigation as spectacularly unsuccessful is not only unsupported in light of the record of outcomes, reflecting relief obtained on a number of fronts, but another indication that the ruling under review was a product of judicial advocacy rather than detached analysis. (2 A 473-474; 3 A 650 [¶¶ 8-12].)

4. Martinez Was Improperly Defamed by Untrue Claims that Martinez Did Not Pay Off Earlier Sanctions Awards.

The trial court was possibly thrown off because the defense blackened Martinez with several comments that were untethered to the truth. Attorney Teeple

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[3] Over Martinez's objection, the trial court refused to allow Martinez to argue that O'Hara's website was partly intended to create a sexual pipeline for him to lure young men into his orbit (3 A 735-736), yet any considered review of CSCA's site and related evidence indicates that O'Hara had some sort of unusual craving to be around young, attractive men and women. (3 A 499, 514, 523, 525, 538-540, 542, 550-551, 560.)

[4] Martinez is hesitant to further discuss the (sore) subject of Judge Munoz, but some might make the argument that triggering a review of his continued fitness by virtue of the 2013 Writ, and which may have been part of the reason his tenure properly ended, also provided a service to the public, albeit one that a practicing lawyer takes no pleasure in reporting, personally cost him $2,500 in sanctions to document, and ultimately cost him all of his political capital with the judge that presided over the trial. (1 A 49-67; 2 A 405-414; *compare* 2 A 416-450 *to* 2 A 458-460.)

In addition, Martinez also put together a body of evidence establishing that O'Hara was in fact behaving as a confidence man, although the public benefit of that has yet to be detected in a discrete form. (1 A 13-15, 55-56, 170, 294, 409-461; 3 A 11-13, 29-37.)

claimed: “He did six amendments. He didn't tell you which of those six amendments he finally added that claim. It's an afterthought claim. In fact, the case had been alive for two years by the time he [added] that claim.” (2 A 451.)

Martinez actually filed an original complaint and three amendments (First, Fourth and Fifth) but had made minor internal changes several times such that the operative complaint was denominated a Fifth Amended Complaint. (2 A 169; 1 A 284; 2 A 482.) The broader idea of six amendments is fiction; the complaint was only slightly modified after the First Amended Complaint (*compare* 3 A 748 to 2 A 169) and only required any revisions because Judge Munoz was deferring to Teeple Hall’s *seriatim* demurrers.

More importantly, the sexual harassment claim was listed as a cause of action in the original complaint and carried through in every amendment. (1 A 11; 3 A 748; 1 A 285; 2 A 169.) For Attorney Teeple to claim that sexual harassment was only brought as a two-years-later afterthought represents a cynical exploitation of the trial judge’s unfamiliarity with the history of the case. (2 A 451.)

Attorney Teeple also slammed Martinez as a deadbeat litigant, one who did not pay the $1,800 discovery sanction ordered by Judge Munoz and who was thus in contempt of court for three years, when in fact the money had been paid exactly according to the 2013 order. (2 A 406-413, 452-453.)[5]

Singularly or collectively, the hearing on the fee motion contained an unusual amount of false accusation by the defense lawyer, which likely contributed on some level to the harsh ruling. (2 A 469-471; 2 A 450-457.)

[5] During the same 2013 interval, Judge Munoz sanctioned Martinez a second time, for filing a motion to reconsider the $1,800 sanction order he had never properly ruled on, which Judge Munoz denied, and which resulted in another $700 in sanctions. (2 A 489, 495.) Attorney Teeple of course told Commissioner Luege that Martinez also did not pay those sanctions (2 A 452-453), Attorney Teeple’s claim was also of course untrue (2 A 413), and of course O’Hara paid no price for these misrepresentations.

5. Even if Reconstructed Billing Records Are Less Accurate than Contemporaneous Ones, Martinez's Decision to Cut the Bill by 2/3 Was More than Adequate to Compensate for any Margin of Error Given the Principles of *Chavez*.

In *Chavez*, the Supreme Court faced a plaintiff seeking $870,000 in compensation based on an $11,500 recovery. (*Chavez v. Los Angeles* (2010) 47 Cal.4th 970, 976.) Chavez pursued twelve causes of action in two lawsuits, a few of which involved fee shifting, he obtained relief on one claim, and spent a total of $1,851 hours while seeking a 2x multiplier. (*Id.*, 979-981.)

In contrast, Martinez spent half that much time, sought no multiplier, prevailed on some level on 5/6 claims, and asked for 1/3 of the actual time spent. (2 A 290, 315.)

The trial court cited the fact that about half of the billing records were reconstructed rather than reported contemporaneously finding them to be "very unreliable." (2 A 447, 469.) However, reconstruction of time records in preparation of an attorney's fee motion is permissible. (*Cates v. Chiang* (2013) 213 Cal.App.4th 791, 821; *Lin v. Jeng* (2012) 203 Cal.App.4th 1008, 1026.)

Here, lead counsel and his team reviewed the case file antecedent to the attorney's fees motion, and assigned value to expenditures of time throughout the proceedings. (2 A 302-315.) With the file being fully intact, there was adequate information to assign time estimates to the numerous and various tasks performed in order to reach reasonable estimates of the work performed. (2 A 302-315.) Counsel's experience included about 60 appeals for the various panels; there was a familiarity with the assignment of time to specific legal tasks aside from contemporaneous reporting.

A few undeniable matters: the case spanned four years of litigation at the trial level (2 A 479, 514); the defense was aggressive as reflected by repeated demurrers and motions to strike (2 A 479, 482-483, 490-491); it involved a class action certification motion (1 A 490-637); an appeal of the adverse ruling (2 A 156); the

case was designated complex (2 A 501); there were 594 docket entries through the trial level (2 A 514); and it required a jury trial (2 A 299-301).

The trial court's finding that 1,000 billable hours for all the detailed legal work necessary to advance these efforts is an unreliable estimate or inflated itself reflects blatant intellectual dishonesty about what is common knowledge experienced plaintiff lawyers share about the real amount of time it takes to responsibly prosecute all aspects of a civil lawsuit against a resistant defendant. Furthermore, the lower court's observation incomprehensibly ignores the fact that Martinez then cut the gross amount of time down by *two thirds*.

Actually, the ruling is easily comprehensible. The lower court abandoned any interest in utilizing detached legal analysis. Rather, she had decided that the penalty for insulting one of the Orange County Superior Court's historically well-regarded judges was death and that her death sentence would be carried out by a wholesale, advocacy-based denial of all compensation. (2 A 458-459, 468-471.)

That's what happened.

Such a dynamic defines what it means for a trial court to abuse its discretion.

The legal basis for the lower court's ruling on overbilling was premised on nitpicky complaints about alleged overbilling. (2 A 469-470.) Whatever. Reconstruction exercises are inherently imperfect. (2 A 302-315.) Counsel represented that the actual hours were within a 10% margin of error of the time reported using reconstruction. (2 A 448.) The gross amount of time was then reduced by **2/3's** to account for all imperfections in that method despite case law that did not necessarily require wholesale apportionment. (*Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493; *Bell v. Vista Unified* (2000) 82 Cal.App.4th 672, 687; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111; *Graciano v. Robinson* (2006) 144 Cal.App.4th 140, 158-159.)

What more can any *reasonable* judge have wanted.

Today, counsel's little firm bills $150K every couple of months; a $150K fee request for four years of litigation is plainly, clearly and obviously not an excessive request.

Reasonable judges do not whack half of a *cost* bill, by making mistakes like failing to realize that there was a writ and an appeal – two appellate fees – against the lower court's accusation that Martinez double billed the costs for the certification appeal. (2 A 470; *Martinez v. O'Hara*, Case No. G048651; *Martinez v. O'Hara*, Case No. G050710.)[6]

Decisions like this announce advocacy over analysis as openly as wearing a bandana on one's arm.

F. The Trial Court's Finding that the Case Benefitted No One But Martinez Disregards the Reality that Martinez Stopped an Intended National Mass, False Advertising Campaign.

The trial court found that the case did not have a broad public impact or result in significant benefit to anyone other than Martinez. (2 A 469-470.) To be sure, compensable public interest litigation requires an important right to be vindicated. (*Graham v. DaimlerChrysler* (2004) 34 Cal.4th 553, 565-566; *Branick v. Downey Savings* (2006) 39 Cal.4th 235, 239, fn. 2.)

Enforcement of false advertising laws is considered in the public interest. (*POM v. Purely Juice* (C.D.Cal.2008) 2008 WL 4222045, aff'd, 362 F. App'x 577 (9th Cir. 2009); *Kennedy Industries v. Aparo* (E.D.Pa. 2005) 416 F.Supp.2d 311, 317); *Church & Dwight v. S.C. Johnson* (D.N.J.1994) 873 F.Supp. 893, 912 [granting injunction: "the public has a right not to be deceived or confused"]; *Republic Molding v. B.W. Photo* (9th Cir. 1963) 319 F.2d 347, 349.)

Applied here, while it may be a difficult to measure the value of something that was prevented from happening, O'Hara certainly had big plans for his fraudulent

[6] The trial court also denied recovery for the $1,009.95 filing fee *imposed* on Martinez when the lower court *sua sponte* designated the case complex. (2 A 470, 501.) Lovely.

website. (1 A 518, 536-537, 543, 3 A 127-173, 744.) He had also demonstrated a historic ability to destroy the people that did business with him. (1 A 13-14, 55-56, 170, 294, 409-456; 3 A 11-13, 29-37.) Accordingly, stopping a confidence man from implementing his next destructive project should not have been so cavalierly disregarded as a public service by the lower court. (2 A 469-470.)

Either way, given the amount of prevarication associated with the website, particularly the purported size and sophistication of O'Hara's CSCA enterprise, characterizing the interruption and termination of it as insignificant, or limited in benefit to Martinez, by reviewing the matter in 2016 constituted a hindsight violation. (*Chavez v. Los Angeles* (2010) 47 Cal.4th 970, 986-987; 2 A 226-266.) In the lower court:

> I would just leave you with the parting thought, Your Honor, that every plaintiff's lawyer has to look into a crystal ball and take a chance. And it's a really difficult exercise. I've been doing it for 20 years. And cases fall out for one reason or another, and it's a really challenging thing to do. And I would just ask the Court to consider that when you think about what this case looked like when I started. I had a guy who was doing some pretty bad things, who was certainly prevaricating up and down on his website, who was pretending he was something that he's not. Maybe now we know it doesn't -- you know, it was a grand Wizard of Oz, but at the time I filed this case, and [only] as we pursued it, we learned that.
> (2 A 450; *see also* 2 A 295 [¶ 10].)

G. The Lower Court Criticized Martinez for Bringing the Case as an Unlimited Civil Action when a Filing in Limited Civil Was Impermissible.

In *Chavez*, the Supreme Court observed that discretion to award costs rests in the trial court for those actions in which the damage award falls below the $25,000 jurisdictional limit and thus could have been brought as a limited civil action. (*Id.*, 975-976.)

The trial court cited this dynamic in ruling that, "[l]ike in *Chavez*, plaintiff's counsel in this case should have determined long before trial that realistically the case

was worth no more than $25,000 and should have pursued the case as a civil limited matter." (2 A 470.)

This Court should also reconsider the entire notion of holding plaintiff lawyers responsible to predict a jury's outcome. Although it might seem like a logical check on a lawyer that applies an unreasonable amount of zealous advocacy to a small matter, the reality is that the courts are effectively putting counsel in an intractable position.

No responsible plaintiff's lawyer can automatically assume that his client's story will be impeached or its impact on a jury minimized; that the long-term emotional trauma, sadness, manipulation and dismay that accompanies sexual mistreatment will be disregarded by the trier-of-fact in denying significant compensation.

Recent public events reveal that the scars of sex accomplished by illegal means lay dormant and festering in the psyche of their victims for years, sometimes decades. These kinds of dynamics were in play in this case, in that it was unclear how much of the sex between Martinez and O'Hara might ultimately be deemed illegally coerced. (2 A 286-287, 294 [¶ 9].)

No plaintiff lawyer can just brush off his client's reported victimization and assume that the claim cannot possibly be worth more than $25,000. The lawyer cannot also risk the idea that the defendant may come across as a terrible person and his client a Boy Scout, such that the jury wants to award a punitive damage multiplier. (Civ. Code, § 3295, subd. (c).)

If for any reason, a jury issued an award that exceeded $25,000 given the lawyer's decision to file in limited, he would be facing a malpractice lawsuit. It would be akin to insurance bad faith where the lawyer would be essentially insuring on a malpractice basis any excess award by having foreclosed it by his own initial litigation decisions, ones that will seem totally misguided from the convenient position of hindsight.

From a plaintiff lawyer's standard accounting of zealous advocacy, ethical obligations, malpractice risk and basic belief-in-one's-cause perspective, the idea of predicting at the outset whether a jury verdict will be above or below $25,000 – which is famously known in legal circles to be an exercise fraught with unpredictability – and then internally foreclosing compensation above the $25K threshold is a total non-starter. We don't make these kinds of irreversible decisions at the outset of a case, guys.

Regardless, Martinez pursued an injunctive cause of action. (2 A 169, 221, 366.) He was required to file his lawsuit in unlimited civil. (Code Civ. Proc., § 86, subds. (a)(7), (a)(8).) Martinez explained this in the papers below and cited the relevant authority. (2 A 369-371.) The trial court still inexplicably found that Martinez should have filed it as a limited action. (2 A 470.)[7]

The lower court faced a difficult analytical path to reach that conclusion. (2 A 470; Code Civ. Proc., § 86, subds. (a)(7), (a)(8).) Yet, it did not confront these statutory limitations at all. (2 A 470.) It simply defaulted on this point. (2 A 470.)

Rulings premised on judicial advocacy typically do not deal with these kinds of difficult obstacles, and this decision also inadvertently revealed that an abuse of discretionary power was at work.

CONCLUSION

As detailed above, the trial court's ruling contained numerous factual and legal errors and can be detected to be the product of advocacy rather than analysis.

It was founded on analogizing this case to *Chavez*, when the two were simply not in the same league in terms of their alleged relative excess.

[7] It also seems wildly unrealistic to have expected Martinez to have filed this case in limited civil, when the lower court itself *sua sponte* designated it at one point as complex. (2 A 501.)

It was similarly premised on treating the litigation as a spectacular failure, when any fair assessment of the matter returned the reality that it was moderately successful: relief on a number of claims, but not big relief.

The lower court made many mistakes, from misapplying *Ling*, refusing to credit O'Hara's capitulation to injunctive relief, interpreting Martinez's minor victory as a part of a massive loss, assessing the fraud claim as another loss despite being the one that debatably ruled it wasn't viable, starting from the wrong place on fees and failing to make the findings respecting their principles as contemplated by *Chavez,* and treating the inherent imprecision in permissibly reconstructed billing records as cause to deny all fees while not accounting for the massive downward adjustment Martinez built in to account for it.

The trial judge also minimized the value of interrupting the destructive projects of conmen, when every practicing lawyer knows that they cause at least a third of the mischief in the legal system.

Finally, the trial court claimed that Martinez overreached by not filing in limited while declining to address the dispositive dynamics that required Martinez to file in unlimited.

Aggregating these mistakes, along with what would be a profound improvement in our legal system if trial judges would try to minimize the dangerous appetite of engaging in judicial advocacy, the overall ruling represents an example of discretion that has been abused.

Martinez requests it to be reversed and for the case to be remanded for a re-determination of fees and costs.

Respectfully:

Date: December 6, 2017

PAVONE & FONNER, LLP

Benjamin Pavone, Esq.
William Mond, Esq.
Attorneys for Appellant

CERTIFICATE OF WORD COUNT

Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing combined brief is proportionally spaced, has a typeface of 14 points, is double-line spaced, and based upon the word count feature contained in the word processing program used to produce that brief (Microsoft Word 2010), contains approximately 11,500 words excluding tables.

Date: December 6, 2017

PAVONE & FONNER, LLP

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL 4th **APPELLATE DISTRICT, DIVISION** 3	COURT OF APPEAL CASE NUMBER: G054840
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 181826 NAME: Benjamin Pavone, Esq. FIRM NAME: Pavone & Fonner, LLP STREET ADDRESS: 550 West C Street, Ste. 1670 CITY: San Diego STATE: CA ZIP CODE: 92101 TELEPHONE NO.: 619 224 8885 FAX NO.: 619 224 8886 E-MAIL ADDRESS: bpavone@cox.net ATTORNEY FOR (*name*): Fernando Martinez	SUPERIOR COURT CASE NUMBER: 30-2012-614932
APPELLANT/ PETITIONER: Fernando Martinez RESPONDENT/ REAL PARTY IN INTEREST: Stephen O'Hara	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Martinez

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 6, 2017

Benjamin Pavone, Esq.
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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STATE OF CALIFORNIA

MARTINEZ, Appellant, v. **O'HARA,** Respondent.	CASE NO. G054840 **PROOF OF SERVICE**

I, Benjamin Pavone, declare as follows:

I am a resident of the San Diego County. I am over the age of eighteen years and not a party to the within entitled action. My business address is 550 West C Street, Ste. 1670, San Diego, California 92101.

On December 6, 2017, I served the following

* AOB plus three volumes of Appendices

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(Brief Only)

Trial Court

These documents were sent as indicated above.

I declare under the laws of the State of California in the County of San Diego under penalty of perjury on this 6th day of December, 2017 that the foregoing is true and correct.